Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DALE GEHRING,

Petitioner,

v.

J.I. CASE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the standard of causation for a multiple motive case brought under the Age Discrimination in Employment Act (ADEA) is the same as for a multiple motive case brought under Title VII of the Civil Rights Act of 1964 so as to require a multiple motive instruction in order to properly inform juries regarding a plaintiff's burden of proof in age cases. In *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)*, a plurality held that the words "because of...an individual's sex" were not synonymous with "but for" causation in a multiple motive case. Although the ADEA also prohibits discrimination "because of...an individual's age," the Court of Appeals for the Seventh Circuit ruled that a "but for" cause instruction

was sufficient standing alone to adequately instruct a jury in a discharge case involving multiple motives in direct conflict with decisions of other courts of appeals.

Also presented is the question whether, under *St. Mary's Honor Center v. Hicks*, ___ *U.S.* ___, *113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)*, a judge should instruct the jury that it may infer age discrimination if it did not believe the employer's explanation for its decision. Although this inference is the pivotal question on which most discrimination cases turn, the Court of Appeals ruled that it was unnecessary to instruct the jury on this "permissible inference."

TABLE OF CONTENTS

Page

OPINIONS BELOW. 1

JURISDICTION. 1

STATEMENT OF THE CASE 2

District Court. 2

Court of Appeals. 7

REASONS FOR GRANTING THE PETITION . . . 9

A. The Court Of Appeals Decision Is In Conflict With This Court's Precedent Rejecting Imposition Of Unrefined But For Standard Of Causation On Plaintiffs In Multiple Motive Discrimination Cases. 9

B. Conflicts Among The Circuits Also Require Resolution By This Court. 19

TABLE OF CONTENTS - *continued*

Page

C. Supreme Court Review Is Essential To Clarify This Court's Decision In *St. Mary's Honor Center* 27

CONCLUSION. 33

INDEX TO APPENDIX 35

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Savage Laboratories, Inc.
675 F.2d 1221 (11th Cir. 1978). 21

Cancellier v. Federated Department Stores
672 F.2d 1312 (9th Cir. 1982) 22

Furnco Construction Corp. v. Waters
438 U.S. 567, 98 S.Ct. 632,
54 L.Ed.2d 490 (1978) 14

Glover v. McDonnell Douglas Corp.
981 F.2d 388 (8th Cir. 1992). 21

Golomb v. Prudential Insurance Co.
688 F.2d 547 (7th Cir. 1982). 23

Haglethorn v. Kennicott Corp.
710 F.2d 76 (2nd Cir. 1983) 23

Hazen Paper Co. v. Biggins
___U.S.___, 113 S.Ct. 1701,
123 L.Ed.2d 338 (1993). 13,15

Page

Kelly v. American Standard, Inc.
640 F.2d 974. 20

Kentroti v. Frontier Airlines
585 F.2d 967 (10th Cir. 1978) 21

Laugesen v. Anaconda Co.
510 F.2d 307 (6th Cir. 1975). . . . 21,22

Loeb v. Textron, Inc.
600 F.2d 1003 (1st Cir. 1979) . . . 19,20

Lorillard v. Pons
434 U.S. 575, 98 S.Ct. 866,
55 L.Ed.2d 40 (1978). 12,13

Mayall v. Peabody Coal Co.
7 F.3d 570 (7th Cir. 1993). 23,24

McDonald v. Santa Fe Trail Transp. Co.
427 U.S. 273, 96 S.Ct. 2574,
49 L.Ed.2d 493 (1973) 15,16

Price Waterhouse v. Hopkins
490 U.S. 228, 109 S.Ct. 1775,
104 L.Ed.2d 268 (1989). . i,9,11,14,15,25

TABLE OF AUTHORITIES - *continued*

Page

Smithers v. Bailar
629 F.2d 892 (3rd Cir. 1980). 20

Spagnuolo v. Whirlpool Corp.
641 F.2d 1109 (4th Cir. 1981) 20

St. Mary's Honor Center v. Hicks
___U.S.___, 113 S.Ct. 2742,
125 L.Ed.2d 407 (1993). . .ii,19,27,29,30

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089,
67 L.Ed.2d 207 (1981) 13,14

United States Postal Service Bd. of Governors v. Aikens,
460 U.S. 711 (1983). 13,30,31

Statutes:

28 U.S.C. §1254(1). 1

29 U.S.C. §621, *et seq*. 2

29 U.S.C. §623(a)(1). 11

29 U.S.C. §631. 25

42 U.S.C. §2000e-2(a)(1). 10

Dale Gehring respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, recorded at 43 F.2d 340 (7th Cir. 1994), appears in the Appendix at A36 through A52. The judgment of the District Court and order denying plaintiff's motion for a new trial appear in the Appendix at A55 and A57.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 29, 1994 and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 30, 1995. (App. A53). The jurisdiction of this court is invoked under 28 U.S.C §1254(1).

STATEMENT OF THE CASE

District Court

The petitioner, Dale Gehring, was the plaintiff in an age discrimination claim brought in the District Court under the Age Discrimination in Employment Act, 29 U.S.C. §621, et. seq. The respondent, J.I. Case Corporation, was the defendant in the District Court proceeding.

In June 1991, after 27-1/2 years of employment with J.I. Case, the petitioner was terminated during a reduction in the work force. Petitioner subsequently filed a suit in District Court alleging that his discharge was motivated by age discrimination because two younger employees were retained in positions for which he was more qualified. During the trial, J.I. Case claimed that petitioner was discharged because he was less versatile than the younger employees who

were retained. J.I. Case further claimed that petitioner's work performance was nonetheless satisfactory and that but for the reduction in force he would not have been discharged. Petitioner not only rebutted defendant's testimony that he was less versatile than the two younger employees but he also introduced direct evidence of age discrimination. In particular, petitioner showed that he was discharged because J.I. Case believed he had "retired before his time" and that "he was resting on his laurels and past performance."

Given that petitioner's discharge involved multiple motives, petitioner asked the District Court to instruct the jury that age did not have to be the sole factor in the discharge decision but simply a factor that made a difference in the decision. (App. A63-A66).

Petitioner also asked the court to instruct the jury that it could infer discrimination if it disbelieved the employer's reasons for its decision. The District Court declined to give these instructions stating that the following instruction told the jury all it needed to know:

> You must decide whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age. If your answer to this question is yes, then you have found that plaintiff's age was a

> determining factor in
> the termination of
> his employment.
> (App. A43 and A44)

An hour after retiring to deliberate, the jury asked the court whether age had to be the only determining factor or one of the determining factors in the discharge:

> Could you please
> clarify the question:
> Was plaintiff Dale
> Gehring's age a
> determining factor...
> Is it the only
> determining factor or
> one of the
> determining factor?
> (App. A44 and A72).

Petitioner asked the District Court to reply that there may be more than one

"determining factor" and that it should decide in his favor if age was among them. (App. A69 and A70). The judge again declined this instruction and instead told the jury that age had to be the but for cause of the plaintiff's discharge:

> By a determining factor I mean the plaintiff must prove he would not have been selected for layoff but for his age. (App. A44 and A45).

After twice being instructed that it was petitioner's burden to prove that age was the "but for" cause of his discharge, the jury returned a verdict for J.I. Case. The petitioner subsequently appealed the jury's verdict on the

grounds that the court's instructions imposed an erroneous and unreasonable burden.

Court of Appeals

The Court of Appeals affirmed the District Court's instruction imposing on petitioner the burden of proving but for causation without a benefit of a multiple motive jury instruction. While affirming the District Court, the Court of Appeals denounced the District Court's use of the words "a determining factor" as "arcane and cabalistic" stating that the words "pose but do not answer the very question this jury asked: What happens if more than one factor is at work?" The Court of Appeals then stated that the words "a determining factor" should be "red penciled" from ADEA jurisprudence and replaced by the following jury instruction:

> You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same. (App. A49).

Rather than simplify the legal standard to a jury, this instruction imposes on plaintiffs the impossible task of having to identify the precise causal role a plaintiff's 40th birthday played in the employment decision. It misconstrues the ADEA as identifying 40 as the "bright line" where age discrimination, if it is to occur, will automatically kick in.

REASONS FOR GRANTING THE PETITION

A. The Court Of Appeals Decision Is In Conflict With This Court's Precedent Rejecting Imposition Of Unrefined But For Standard Of Causation On Plaintiffs In Multiple Motive Discrimination Cases.

In conflict with decisions of this court, the Court of Appeals incorrectly ruled that a "but for" cause instruction was adequate, without more, to instruct a jury where plaintiff's discharge was motivated by multiple factors. In *Price Waterhouse*, this court rejected a stark "but for" standard of causation for multiple motive cases brought under Title VII. This court noted that Title VII forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise discriminate with respect to his compensation, terms, conditions or

privileges of employment...<u>because of</u> such individual's...sex. 42 U.S.C. §2000e-2(a)(1). This court then reasoned that the words "because of" were not synonymous with "but for causation" since Congress could not have meant to obligate a plaintiff to identify the precise causal role played by each potential motive in an employment decision:

> We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of" Congress meant to obligate a plaintiff to identify the precise causal role played by a

> legitimate and illegitimate motivation in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex based considerations in coming to its decision. *Id., 109 S.Ct. at 1785.*

With the exception of the word "age," §623(a)(1) of the ADEA is identical to the Title VII provision discussed in *Price Waterhouse*:

> It shall be unlawful for an employer -

> (1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Given the identical wording of these two statutes, Congress could not have intended to impose a higher standard of causation for claims brought under the ADEA than for claims brought under Title VII. To the contrary, in *Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866, 55*

L.Ed.2d 40 (1978) this court noted that there were "important similarities" between the substantive prohibitions of Title VII and the ADEA. The court explained that while the procedural and remedial provisions of the ADEA followed those of the Fair Labor Standards Act that the ADEA's substantive prohibitions "were derived *in haec verba* from Title VII." *Id., 98 S.Ct. at 872.* More recently, in *Hazen Paper Co. v. Biggins, ___ U.S. ___, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)*, this court cited Title VII cases for the proposition that ADEA liability is established where a plaintiff shows that age "actually motivated the employer's decision." *Id., 113 S.Ct. at 1706, citing United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S.*

248, 252-256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-578, 98 S.Ct. 632, 54 L.Ed.2d 490 (1978).*

The ADEA is also identical to Title VII in that both recognize that an employer may take a protected trait (sex and/or age) into account when the protected trait is a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the particular business or enterprise. In *Price Waterhouse* this court found that the BFOQ exception supported its interpretation that the words "because of" were not synonymous with "but for" causation. *Id. at 1786.* This same rationale also applies to the words "because of" found in the ADEA.

In requiring petitioner to prove that age was a but for cause of his

discharge without instructing the jury that age need only be one of the determining factors if they found multiple motives at play, the Court of Appeals carved out new law. The but for standard of causation imposed on this petitioner is in conflict with this court's decision in *Price Waterhouse* as well as this court's decision in *Hazen Paper Co.* which defined the causal standard in terms of whether age was a motivating factor in the employer's decision. While this court's decision in *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n.10, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1973)* used the term "but for," this court, in *Price Waterhouse*, distinguished *McDonald* by noting that "this passage...does not suggest that the plaintiff must show but cause; it indicates only that if she does

so, she prevails." *Id*. This court also noted that *McDonald* arguably involved only a single motive. In contrast, multiple factors were involved in the plaintiff's termination which prompted the jury to ask:

> Could you please clarify the question: Was plaintiff Dale Gehring's age a determining factor... Is it the only determining factor or one of the determining factor? (App. A44 and A72).

By twice instructing the jury that petitioner had to prove "but for" causation and by further refusing to tell the jury that age did not have to be the sole factor in the decision, the District

Court guaranteed a verdict for J.I. Case. This guarantee was reinforced by the court's additional instruction that the jury was not to second guess J.I. Case's business judgment and that Case was allowed to take its action so long as it had "a legitimate non-discriminatory reason." (App. A71). This instruction told the jury that even if age was a determining factor in petitioner's termination, that the jury must find for J.I. Case if Case produced a legitimate reason for the termination.

The jury's verdict was clearly erroneous since it was evident by the jury's question that they already believed age to be one of the determining factors in the decision and would have returned a verdict for petitioner if they had been properly instructed in the law.

Clearly, there are significant conflicts between the Court of Appeals' decision in this case and decisions of this court. These conflicts involve pivotal issues as to the interplay between Title VII and the ADEA and the proper standard of causation to be applied in employment discrimination cases. This interplay is of particular importance now given the recent extension of Title VII to include a right to trial by jury and the likelihood that district courts will look to jury instructions developed under the ADEA in fashioning jury instructions under Title VII. As this court stated:

> Clarity regarding the requisite element of proof becomes all the more important when a jury must be

instructed concerning them[.]

St. Mary's Honor Center, *113 S.Ct. at 2756*.

Given the importance of the issues involved, Supreme Court review is essential to resolve the conflicts between this court and the Seventh Circuit Court of Appeals and ensure consistency between the substantive provisions of the ADEA and Title VII.

B. Conflicts Among The Circuits Also Require Resolution By This Court.

Although the circuit courts of appeals agree that liability under the ADEA requires proof that age was "a determining factor" in the decision, the circuits vary widely as to what is meant by the words "a determining factor." Like the Seventh Circuit, the First Circuit Court of Appeals in *Loeb v.*

Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) ruled that "a determining factor" means "but for" causation. In *Loeb*, the First Circuit held that a finding that age was a factor that affected the decision was not equivalent to finding that age was a determinative factor and rejected the district court's use of a "factor that makes a difference" standard. *Id*. See also *Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir. 1981)* (Determining factor means but for causation); *Kelly v. American Standard, Inc., 640 F.2d 974, 984* (same).

In contrast, the Third Circuit, in *Smithers v. Bailar, 629 F.2d 892, 897 (3rd Cir. 1980)*, held that it was sufficient for the plaintiff to show that age was a factor that made a difference in the decision. The Third Circuit stated that the plaintiff "must establish

that age played a part in the decision, even though the employer could demonstrate strong and perhaps more compelling non-discriminatory reasons for his actions." *Id., at 897.* See also *Laugesen v. Anaconda Co., 510 F.2d 307, 316-317 (6th Cir. 1975)* (Plaintiff may recover if age "made a difference" in the decision); *Kentroti v. Frontier Airlines, 585 F.2d 967, 974 (10th Cir. 1978)* (Same); *Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1978)* (Same). Recently, the Eighth Circuit developed yet another standard in *Glover v. McDonnell Douglas Corp., 981 F.2d 388, 393-394 (8th Cir. 1992)* by ruling that a plaintiff must prove that age was a motivating factor in the decision.

While the circuits vary widely as to the appropriate standard of liability

under the ADEA, all circuits which have addressed the issue, with the exception of the Seventh Circuit, have ruled that the jury must be told that age does not have to be the sole factor in the decision. *Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975)* ("It was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge [the plaintiff] and that he was nevertheless entitled to recover if one such factor was his age and...it made a difference in determining whether he was to be retained or discharged"); *Cancellier v. Federated Department Stores, 672 F.2d 1312, 1316 (9th Cir. 1982)* ("Instructions must protect against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a but for cause

of the discharge") and *Haglethorn v. Kennicott Corp., 710 F.2d 76, 86 (2nd Cir. 1983)* (Jury must understand both that there can be more than one determining factor in the employment decision and...that age must be a factor which makes a difference in the decision).

Although the Seventh Circuit in *Golomb v. Prudential Insurance Co., 688 F.2d 547, 522 n.2 (7th Cir. 1982)* stated that district courts should "expressly instruct the jury that age need not be the sole determining factor," the Seventh Circuit, in *Mayall v. Peabody Coal Co., 7 F.3d 570, 574 (7th Cir. 1993) (J. Rovner, dissenting)*, recently ruled that this instruction was not required because the term "a determining factor" had a clear and unambiguous meaning. Subsequently, in petitioner's case, the jury asked the

very question which the Seventh Circuit had claimed was self-evident in *Mayall*, i.e., what is meant by "a determining factor? Is it the only determining factor or one of the determining factors?" Rather than squarely address this contradiction, Justice Easterbrook, who was on the panel that decided *Mayall*, dismissed the jury's question as irrelevant. In direct contradiction to *Mayall*, Justice Easterbrook declared that the term "a determining factor" was "arcane, cabalistic, inscrutable and ambiguous" and should "be red penciled" from ADEA jurisprudence. He then recommended replacing "a determining factor" with the following instruction:

> You must decide
> whether the employer
> would have fired
> [demoted, laid off]

> the employee if the employee had been younger than 40 and everything else had remained the same. (App. A49).

This standard imposes on plaintiffs the impossible task of identifying the precise causal role age played in an employment decision - an approach rejected by this court in *Price Waterhouse*. This instruction also misconstrues the ADEA as prohibiting discrimination because an employee has turned 40 rather than prohibiting discrimination because of an employee's age. The ADEA's 40 and over requirement found in 29 U.S.C. §631 merely defines the persons who can claim protection under the Act. It is not a trip switch that determines when age discrimination,

if it is to occur, will automatically kick in.

Justice Easterbrook's proposed instruction relegislates the ADEA by focusing on the event of turning 40 as opposed to age as a factor in determining the legality of employment decisions. Under the proposed instruction, an employer could reduce a work force in a particular area by stating that all employees over 39 will be terminated and, even if age were the sole criteria, adversely affected employees over 40 would have no recourse under the Act. This formulation leaves common sense at the doorstep and effectively guts the substantive provisions of the ADEA.

The Seventh Circuit's opinion in petitioner's case has opened a Pandora's Box. Rather than clarify the standard of causation for ADEA liability, the Seventh

Circuit's opinion will be certain to create a greater rift among the circuit courts of appeals and generate more confusion for district courts faced with the practical task of instructing juries in both ADEA and Title VII cases. Supreme Court review is essential to resolve the conflicts among the circuits and to halt the Seventh Circuit's attempts to rewrite ADEA jurisprudence by mandating a multiple factor instruction.

C. Supreme Court Review Is Essential To Clarify This Court's Decision In *St. Mary's Honor Center*.

In *St. Marys Honor Center*, this court ruled that the fact finder in a Title VII case could, but was not required to, infer discrimination if it disbelieved the employer's reasons for its actions. In so ruling, the court noted that the respondent had argued that

it was "ill-advised" for the court to come forth with such a holding just as Congress had provided a right to jury trials in Title VII cases. This court disagreed stating:

> We think quite the opposite is true. Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review.

Id., 113 S.Ct. at 2757.

Based upon this court's ruling in *St. Mary's Honor Center*, the petitioner in this case asked the District Court to instruct the jury as follows:

> If you find that the reasons given by the defendant for selecting plaintiff for termination were not the true reasons, you may infer the defendant intended to discriminate against the plaintiff. However, while a discriminatory motive may be inferred from this fact alone, you are not compelled to draw this inference. (App. A61).

The District Court declined to give this instruction and the Seventh Circuit affirmed stating that a judge need not deliver instructions describing all permissible inferences. This instruction described more than just another permissible inference. It told the jury that it could infer discrimination based solely on disbelief of the employer's reasons - an inference that goes to the very heart of our discrimination laws. This inference is the crux of the *McDonnell Douglas* paradigm which was devised as "a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed through only circumstantial evidence." *St. Mary's Honor Center, 113 S.Ct. at 2757 citing United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103*

S.Ct. 1478, 75 L.Ed.2d 403 (1983) ("There will seldom be 'eye witness testimony to the employer's mental processes.'") The purpose of this framework was "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id. citing Burdine, 101 S.Ct. at 194, n.8.*

Without such an instruction, juries will be left to guess as to the type of evidence required to prove discrimination. While some juries may be omniscient and divine on their own that proof of mendacity on the employer's part is sufficient to establish discrimination, there are other juries who may not be so omniscient. If, as the Seventh Circuit maintains, this inference is irrelevant to a jury's understanding of discrimination law, then one must ask why so much judicial time has been spent

developing and refining the *McDonnell Douglas* paradigm and the inferences that can be drawn from it. If the Seventh Circuit is correct, then the *McDonnell Douglas* paradigm may as well, in the words of Justice Easterbrook, be "red penciled" from our jurisprudence as an "arcane, inscrutable and cabalistic" relic of the past.

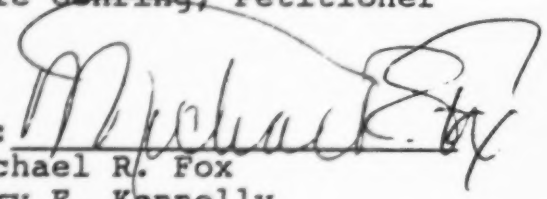
Clearly, Supreme Court review is essential to clarify the importance the *McDonnell Douglas* paradigm plays in the enforcement of our discrimination laws.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted:

Dale ~~Gehring~~, Petitioner

By: 

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APPENDIX OF THE PETITIONER DALE GEHRING

INDEX TO APPENDIX

DECISION OF SEVENTH CIRCUIT	A36-A52
ORDER DENYING PETITION FOR REHEARING EN BANC	A53-A54
JUDGMENT OF DISTRICT COURT	A55-A56
DISTRICT COURT ORDER DENYING MOTION FOR NEW TRIAL	A57-A58
TRANSCRIPT OF INSTRUCTION CONFERENCE (SELECTED PORTIONS)	A59-A70
JURY INSTRUCTION	A71
JURY QUESTION	A72

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1371

Dale Gehring

Plaintiff-Appellant,

v.

Case Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin
No. 93-C-0135-C

Barbara B Crabb, Chief Judge

Argued September 14, 1994
Decided December 28, 1994

Before Lay, *Easterbrook and Ripple, Circuit Judges.

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* Hon. Donald P. Lay, of the Eighth Circuit, sitting by designation.

EASTERBROOK, Circuit Judge. Case Corporation (formerly J.I. Case Corp.) is one of the world's leading producers of construction and agricultural machinery. Selling in a global market, Case has been under intense competitive pressure, and its older facilities have not flourished. The plant in Wausau, Wisconsin had been shrinking steadily when in June 1991 management told Ray Watson, the Controller at Wausau, that he would have to make do with two cost accountants rather than five. Dale Gehring was among the three Watson picked to let go. Gehring had been a supervisor until 1988 when an earlier reduction in force returned him to a line position. Watson believed that Gehring had not adjusted well and was reluctant to do the drudge work of ordinary cost accountancy. Gehring believes that his age (52 at the time) rather than his attitude accounts

for the decision, but the jury believed Watson's explanation and returned a verdict for Case. Gehring asks us to award him another trial. (The Wausau plant closed in October 1993, but Gehring could recover for wages lost between June 1991 and October 1993 if his age led to the earlier discharge.)

The district judge curtailed discovery from Case's personnel files, and Gehring believes that this unduly hampered his case. Gehring was not trying to show that the reduction in force had a disparate impact on Case's older employees-a theory of age discrimination that is unavailable in this circuit, *EEOC v. Francis W. Parker School*, No. 93-3395 (7th Cir. Oct. 21, 1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)-but instead wanted the files to help him establish that Case gave better treatment to younger

employees, buttressing his claim that the reason for his discharge was age. Using this method depends on showing that the other employees selected for comparison are situated similarly to the plaintiff. *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736-38 (7th Cir. 1994). After examining the personnel files Gehring wanted to use, the district judge concluded that the other employees' circumstances were not close enough to Gehring's to make comparisons productive. Turning over the files, however, would invade the privacy of the other employees and the district judge feared that Gehring wanted to use this evidence not for purpose of comparison but to put Case's personnel practices on trial. The judge concluded that the privacy interests, coupled with her determination to keep the trial focused squarely on Gehring's claim, justified limiting

counsel's ability to root through the personnel files. The judge followed up with similar evidentiary rulings at trial. District judges have substantial discretion to make such decisions to curtail the expense and intrusiveness of discovery and trial. *Rennie v. Dalton*, 3 F.3d 1100, 1110 (7th Cir. 1993). The judge, who permitted live testimony (in Gehring's favor) from one of the proposed comparison employees, did not abuse that discretion.

Gehring's other arguments concern the jury instructions. He wanted the judge to walk the jury through the paradigm established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The judge declined, for the very good reason that the Supreme Court has held that this burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial. Once the judge

finds that the plaintiff has made the minimum necessary demonstration (the "prima facie case") and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose and the only remaining question-the *only* question the jury need answer-is whether the plaintiff is a victim of intentional discrimination. *Postal Service v. Aikens*, 460 U.S. 711, 715 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). See also *EEOC v. G-K-G, Inc.*, No. 93-2275 (7th Cir. Nov. 4, 1994), slip op. 9; *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1312-13 (7th Cir. 1985). Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's

explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law, *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993), but a judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel. *United States v. Sblendorio*, 830 F.2d 1382, 1391 (7th Cir. 1987). Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.

One of Gehring's arguments gives us pause, however. Not only the lawyers but also the judge repeatedly used the words "determining factor." The special verdict forms called on the jury to decide whether Gehring's age was "a determining factor in the defendant's decision to terminate his employment?" The instruction defining this term reads:

> You are instructed that in answering Question No. 1 on the special verdict form, you must decide whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age. If your answer to this question is yes, then you have found that plaintiff's age was a determining factor in the termination of his employment and you should answer "yes" to Question No. 1 on the

verdict. If you decide that the plaintiff has not shown by the greater weight of the credible evidence that he would have been let go had it not been for his age, then you have found that age was not a determining factor in the termination of his employment and you should answer "no" to Question No. 1 on the verdict.

After deliberating for a while, the jury asked the judge to clarify what it means for age to be "a determining factor...Is it the only determining factor or one of the determining factor?" [Sic.] Gehring asked the judge to reply that there may be more than one "determining factor" and that it should decide in his favor if age was among them. Instead the judge told the jury:

The question asks about a determining factor. By a determining

factor, I mean the plaintiff must prove that he would not have been selected for layoff but for his age.

Gehring insists that both the original instruction and the response to the jury's question are error.

How "determining factor" entered the vocabulary of age discrimination is a mystery. The term does not appear in the Age Discrimination in Employment Act, and the Supreme Court has never used it in a case under the ADEA. True, the Court once quoted from a legislative report that contains the term, see *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 411 n.16 (1985), but it did not suggest that these words have any legal significance. Terms that lack legal meaning may be useful in jury instructions if they assist lay deciders in coping with the words that do carry legal force. But "determining factor" is not a term in common usage and

it therefore does not illuminate the essential concepts. Putting unusual terms in jury instructions does little beyond confusing the jurors. Jurors must learn concepts with which they are apt to be unfamiliar. Expressing these concepts in terms with which they are unfamiliar can't help matters. Good instructions use simple words in short, concrete sentences. E.g., Federal Judicial Center, *Pattern Criminal Jury Instructions* (1987) (including an appendix of suggestions for making instructions more understandable). Judges ought not assume that jurors come armed with copies of H.L.A. Hart & Tony Honore, *Causation in the Law* (2d ed. 1985), and the academic background necessary to put its distinctions to use.

The legal question is straightforward and may be explained without reference to words such as "determining factor." Hart & Honore found

it possible to plumb the depths of causation without employing these words; juries, too, can dispense with them. They must decide whether age accounts for the decision-in other words, whether the same events would have transpired if the employee had been younger than 40 and everything else had been the same. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706 (1993); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc). Because the ADEA's question is counterfactual (the jury must ask what would have happened if conditions were different), it is especially important to write instructions that are as clear and simple as possible. When the legal issue is complex, simplicity of language is vital. "Determining factor" has no useful role to play in jury instructions under the ADEA. These words pose but do not answer

the very question this jury asked: what happens if more than one factor is at work?

To say that jury instructions ought to avoid legalistic and ambiguous terms is not to say that an instruction including them is reversible error. *Mayall v. Peabody Coal Co.*, 7 F.3d 570, 573-74 (7th Cir. 1993), holds that an instruction using this term does not compel reversal, even if the judge declines to add that there may be more than one determining factor. Gehring contends that the events of his trial show the problem with this term and should lead us to overrule *Mayall*, but the principle of that case-that a party is not entitled to the best possible instruction-is sound and dispositive. For the instructions given to this jury told the jury what it needed to know. Recall the first sentence of the instruction:

"You are instructed that in answering Question No. 1 on the special verdict form, you must decide whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age." This is the fundamental question under the ADEA and the judge repeated this advice when the jury asked about "determining factor." In these instructions "determining factor" carried no weight. The words could have been replaced by "banana" wherever they appeared, without loss of meaning.

What the jury needs to know can, and should, be expressed in simple language. Here is one attractive formulation: "You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same." Such an instruction uses

simple and familiar words, avoids double negatives, and can be tailored to the circumstances of the claim. It tells the jury what to do if it finds that the employer took more than one thing into account. Suppose the employer considered four things in sacking an employee: age, skills, attendance and attitude. If any two of these (mediocre skills and bad attitude, for example), would have been enough to produce a discharge, then there has been no age discrimination, and a jury asking the question as we have phrased it would give the right answer. If, however, all four in conjunction brought about the discharge-if the employee would have been retained had he been younger, or more punctual, or more skilled, or more enthusiastic-then age tipped the balance, and the employee should prevail, and would do so under the instruction we suggest. Similarly, if the

employer would not have discharged the employee without the presence of three factors, and the jury disbelieves the employer's position on one of them (concludes, say, that the employee's attitude was fine), then under this formulation the jury will return a verdict for the plaintiff.

Other cases suggest variations, which although a little more complex provide the same information. See *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393-94 (8th Cir. 1992) (suggesting that the judge tell the jury to decide for the defendant if the same decision would have been made regardless of the plaintiff's age). We do not want to tie the judge's hands; language works best if it responds to the nature of the precise dispute between the parties. But we urge every district judge to take a red pencil to arcane, cabalistic, inscrutable,

ambiguous and unnecessary words. The closer the instructions come to the jurors' everyday language, the more likely the jurors are to apply them correctly.

AFFIRMED

A true Copy:
Teste:

/s/_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 30, 1995

Before

Hon. Donald P. Lay, Circuit Judge*

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

DALE GEHRING,
Plaintiff-Appellant,

No. 94-1317

CASE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin
No. 93-C-0135-C
Barbara B. Crabb, Chief Judge.

Order

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on January 19, 1995. No judge in regular active service has requested a vote on the suggestion of rehearing en banc. and all of the judges on the panel have voted to deny rehearing. The

petition for rehearing is therefore DENIED.

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*Hon. Donald P. Lay of the Eighth Circuit is sitting by designation.

UNITED STATES DISTRICT COURT
Western District of Wisconsin

DALE GEHRING, JUDGMENT IN A CIVIL CASE

Plaintiff, Case No. 93-C-0135-C

vs.,

J.I. CASE,

Defendant.

This action came before the court and a jury with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

---

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant J.I. Case recover of the plaintiff, Dale Gehring, its costs of action.

Approved as to form this 28th day of January, 1994.

/s/_____
Barbara B. Crabb
U.S. District Judge

This document has been provided to Fox & Shindell this 31st day of January, 1994
By /s/_____
S. Hahn
Deputy Clerk

_____
Joseph W. Skupniewitz, Clerk

/s/_____ Jan 31 1994
Warren Nelson
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DALE GEHRING,

Plaintiff,

v.

J.I. CASE,

Defendant.

ORDER

93-C-135-C

- -

Plaintiff has moved for a new trial on a number of grounds. All of the grounds that he raises were dealt with either before trial or during the course of trial. I do not see that any purpose would be served in discussing these further.

IT IS ORDERED that plaintiff's motion for a new trial is DENIED.

Entered this 7th day of February, 1994.

BY THE COURT:

/s/_____
Barbara B. Crabb
District Judge

A copy of this document has been mailed to the following: Atty Fox & Shindell this 8th day of February, 1994 by J.M. Dye, Secretary to Judge Crabb

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

DALE GEHRING,

Plaintiff,

vs. Civil Case 93-C-0135-C

J.I. CASE, Madison, Wisconsin
January 26, 1994
Defendant. 9:02 a.m.
VOLUME 3-A

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF TRIAL HELD BEFORE THE HONORABLE BARBARA B. CRABB, and a Jury. (Morning Session Only.)

APPEARANCES:

For the Plaintiff:
Fox & Fox
BY: MICHAEL R. FOX
MARY E. KENNELLY
44 E. Mifflin Street
Suite 403
Madison, WI 53703

For the Defendant:
Shindell & Shindell
BY: LAWRENCE M. SHINDELL
ANNE B. SHINDELL
411 E. Wisconsin Ave
Milwaukee, WI 53202

Also Present:

Dale Gehring, Plaintiff

Dennis R. Winkleman, J.I. Case Company

KATHLEEN BANKS
Official Court Reporter
United States District Court
120 N. Henry St., Rm. 120
Madison, WI 53703
1-608-255-3821

MS. KENNELLY: I do have one that I would like to propose that's based on the Hicks decision. It's taken almost verbatim from the Opinion on Page 8.

If you find that the reasons given by the defendant for selecting plaintiff for termination were not the true reasons, you may infer the defendants intended to discriminate against the plaintiff. However, while a discriminatory motive may be inferred from this fact alone, you are not compelled to draw this inference.

And that tracks the language right here in the Decision almost verbatim.

THE COURT: Okay.

MS. KENNELLY: Should I read a little slower or --

MS. SHINDELL: I believe the instruction we have there says that if you find -- or, well, it goes or it's

incorporated into our burden of proof. But there's a second one, and that begins-

MR. SHINDELL: It is right here. It's right here. It begins here.

If you find that plaintiff has proven these facts, and it's referring back to earlier, and it is on Page 32 of our submitted instructions, and that the defendant has not produced a reason other than age for the elimination of plaintiff's position, then you must find for plaintiff.

If on the other hand, defendant has produced evidence of a

THE COURT: All right. If you decide that plaintiff has not shown blah, blah, blah.

MR. SHINDELL: Right.

MS. SHINDELL: That age was the determining factor.

THE COURT: All right, you can figure that out. This is Karen Guss, by the way, my law clerk.

MS. GUSS: Yes.

THE COURT: That's all I was going to do, except for what they have to know about punitive.

MS. KENNELLY: I have one request.

MS. SHINDELL: I have one proposal. I am sorry, I didn't mean -- go ahead.

MS. KENNELLY: This we would like to submit. Actually it's Defendant's Proposed Instruction Number 19, which is very similar to one we had incorporated into the instruction we use, which is -

the line in particular we're interested in is the second line. It's Page 30.

The plaintiff need not prove that age was the only factor motivating the defendant's decision, but he must prove that age was a "determining factor" in the elimination of his position and his severance.

MS. SHINDELL: And it should be "the determining factor."

MR. SHINDELL: Well, our instruction-

THE COURT: Which number is that?

MS. SHINDELL: It is Page 30.

MS. KENNELLY: Page 30, Instruction Number 19.

MR. SHINDELL: We would agree to that, Your Honor, only if the Court gave the corollary instructions. Because the one they have isolated only makes sense in the context of the ones before and after, which I'm sure the Court doesn't want to do.

MS. KENNELLY: The whole instruction, that's fine.

MS. SHINDELL: No. The one that you have isolated is part of a set. And if you pull it out, it's not -- it doesn't make sense.

THE COURT: I don't think that we need that. I think that's what this is intended to do.

MR. FOX: Can we integrate a sentence into that about the multiple, or because

we are always concerned about the multiple factor situation, and some reference to that? And I don't know whether or not -

MR. SHINDELL: Well, maybe we can resolve it, because Case is not going to argue that it is not a factor, but it is not the determining factor. We're not going to get into this big motive thing, which should be apparent from our case, so -

MS. KENNELLY: I already think there is a mixed motive issue, because we have admitted that the reduction in force was a factor in the determination.

MR. SHINDELL: Yeah, but -

MS. KENNELLY: It is possible under the instructions

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DALE GEHRING,

Plaintiff,

vs.

J.I. CASE,

Defendant.

VOLUME 3-B

Case No. 93-C-135-C

Madison, Wisconsin
January 26, 1994
2:15 p.m.

TRANSCRIPT OF THIRD DAY OF TRIAL,

Afternoon Session HELD BEFORE THE

HONORABLE BARBARA B. CRABB, and a Jury.

APPEARANCES:

For the Plaintiff:

Fox & Fox, S.C.
BY: MICHAEL FOX, and
BY: MARY KENNELLY
44 E. Mifflin Street
Suite 403
Madison, WI 53703

For the Defendant:

Shindell & Shindell
BY:LAWRENCE SHINDELL
BY:ANNE B. SHINDELL
411 E. Wisconsin Ave
Milwaukee, WI 53202

Also Present: Dale Gehring,
plaintiff

Dennis R. Winkleman
Representative for
J.I. Case

NANCY SCHELL
Official Court Reporter
United States District Court
120 North Henry Street
Madison, Wisconsin 53703
1-608-255-3821

the jury.)

(At 5:30 p.m. proceedings reconvened outside the presence of the jury.)

THE COURT: They certainly went right to the heart of it, didn't they? For the record, I will read the question from the jury and note that there are appearances for the plaintiff and the plaintiff is present in person and the defendants are here by counsel.

The note is: "The Honorable Barbara B. Crabb: Could you please clarify the question was plaintiff Dale Gehring's age an underlying determining factor? Is the only determining factor or one of the determining factors?" It is signed by Mr. Ausse.

Any suggestions as to whether the question should be answered and, if so, how?

MR. FOX: The plaintiff would like it answered that it is one of the determining -- we could reinstitute the requested instruction, but there may be more than one determining factor. It simply has to be one of the determining factors in the decision.

MR. SHINDELL: This goes precisely to what we raised before, and I think the only legally correct answer can be that it must be the determining factor and it should be answered in that way.

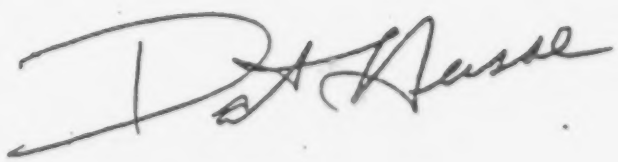
We would also ask that the special verdict be modified to

In determining whether plaintiff has proven that defendant intended to discriminate against plaintiff because of his age, I instruct you that the question is not whether defendant exercised good business judgment in eliminating plaintiff's position, or whether you agree or disagree with defendant's reason. Defendant was allowed to take its action so long as defendant had a legitimate, non-discriminatory reason.

To the Honorable Barbara B Crabb

Could you please clarify the question: was plaintiff Dale Geinrig's age a determining factor...

Is it the only determining factor or one of the determining factor?



PC 1/26/94

P.'s at 155 [illegible]

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